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Abu Bakar Rajudin (from Abu Bakar Rajudin & Co acting as receiver and manager for Sykt Usahasama Km-Ldah Sdn Bhd) v Sykt Perumahan Negara Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-307–02 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
C 14 SEPTEMBER 2016

Companies and Corporations — Receivership — Receiver's personal liability
D *— Whether receiver/manager of company personally liable for 'debt' company owed contractor — Whether receiver acted on company's behalf in appointing contractor but could not be jointly liable with company in circumstances of case — Contracts Act 1950 s 186 — Whether plaintiff wrongly sued receiver/manager for alleged debt — Whether proper party to be sued was company*
E *(in receivership) — Whether exceptions in s 183(1) of the Companies Act 1965 making receiver personally liable for certain debts did not apply — Whether plaintiff failed to prove amount it claimed on balance of probabilities*

When the developer (Syarikat Usahasama Kam-Ldah Sdn Bhd) ('the
F developer') of a housing project ran into financial difficulties and abandoned the project, its financier, Aseambankers Malaysia Bhd ('Aseambankers'), in favour of whom the developer had executed a debenture, appointed the appellant as receiver and manager of the developer to safeguard its interests. The appellant's appointment was made with the respondent's consent and the
G latter's undertaking to bear all costs and expenses of the appellant's appointment including his remuneration. The appellant's letter of appointment expressly declared that he was the agent of the developer and not of Aseambankers and that the developer alone would be responsible for his acts, omissions and defaults. In a letter, signed by the appellant on the developer's
H behalf as its receiver and manager, the developer appointed the respondent to take over and complete the project. The respondent completed the works and claimed it had not been paid a balance of RM10,251,700.35 for work done. This figure was derived from the appellant's summary of accounts which showed that from the RM41,408,147.38 the appellant had collected from the
I project, he had released RM31,156,447.03 to the respondent. The respondent sued the appellant in the High Court to recover the balance amount. At the trial, the appellant maintained that he was not personally liable to hand over the balance sum to the respondent because the respondent's contract was not with him but with the developer. He stressed that he had been wrongly sued as

he had at all times acted as the developer's agent and the latter should have been the proper defendant in the suit. The appellant also submitted that since the final accounts for the project had not been completed, the balance monies he held was for the benefit of the secured and unsecured creditors and he could not make a preferential payment to the respondent over other parties who had priority to be paid. The appellant also submitted that the respondent had failed to prove it was entitled to the sum claimed. The instant appeal sought to set aside the High Court's decision allowing the respondent's claim.

Held, allowing the appeal and setting aside the judgment of the High Court:

(1) The appellant was not personally liable for the sum claimed by the respondent and was the incorrect party that was sued in respect of the 'debt'. The correct party that should have been sued was the developer (in receivership). The trial judge's failure to consider this issue, although it was an issue to be determined at trial, was an error of law which resulted in a miscarriage of justice warranting appellate intervention. On this issue alone, namely whether the proper party had been made defendant in the suit, the appeal had to be allowed (see paras 75 & 78–79).

(2) The appellant was at all times the developer's agent. In carrying on the business of the company, he was not transacting on his own behalf, which was why the transaction was done in the name of the company. Additionally, the deed of appointment made it clear that it was the developer that was responsible for his acts. Although s 183(1) of the Companies Act 1965 ('the CA') modified the common law position (that a receiver did not incur liability for contracts entered into after his appointment where he contracted as agent of either the company or the debenture holder)and made a receiver personally liable for certain debts he had incurred in the course of the receivership, that section did not apply in the present case as the 'debt' claimed by the respondent did not fall within the subsections of 'services rendered', 'goods purchased', or 'property hired, leased, used or occupied'. 'Services rendered' did not envisage a receiver and manager taking on liability for the construction costs of a contractor in respect of the rehabilitation of a housing project. As the letter of award was not made by the receiver in his personal capacity, it was not therefore a 'debt incurred by him' as envisaged in s 183(1) of the CA. It was, in fact, a debt incurred by the developer because the appellant was appointed to essentially continue with the original business of the developer in constructing the units in the abandoned project (see paras 62–64 & 72–74).

(3) The contract, ie the letter of award, was between the developer (in receivership) and the respondent. It had to be signed by the receiver as he was possessed of the charged property in accordance with his instrument of appointment. But that in itself could not make him personally liable

for the potential debts to be incurred in respect of the project vis a vis the respondent. He executed the letter in his capacity as agent of the developer and this was evident from the fact he acted at all times on behalf of the company. The general position in such a situation was that the principal was liable for the acts of his agent. Although s 186 of the Contracts Act 1950 envisaged that both an agent and the principal might be liable, the circumstances of this case did not warrant the application of that section (see para 71).

(4) On the merits, the trial judge's conclusion that the sum of RM10,251,700.35 was due and payable to the respondent was plainly wrong. The respondent failed to prove its claim on balance of probabilities. The respondent had no independent accounts to establish its claim and relied on an 'admission' by the receiver and manager in his summary of accounts. The summary was a statement of the total sum collected by the appellant, the amount paid to the respondent and the outstanding balance. It had not been established that the entire balance remaining in the receiver's account was payable to the respondent. As stated by the appellant, the monies held in his account were for the benefit of both secured and unsecured creditors (see paras 80–82 & 84–86).

[Bahasa Malaysia summary

Apabila pemaju (Syarikat Usahasama Kam-Ldah Sdn Bhd) ('pemaju') projek perumahan mengalami masalah kewangan dan mengabaikan projek tersebut, pembiayanya, Aseambankers Malaysia Bhd ('Aseambankers'), di mana pemaju telah melaksanakan debentur dengannya, melantik perayu sebagai penerima dan pengurus pemaju untuk melindungi kepentingannya. Pelantikan perayu telah dibuat dengan persetujuan responden dan responden mengaku janji untuk menanggung semua kos dan perbelanjaan pelantikan perayu termasuk gajinya. Surat pelantikan perayu secara nyata mengisytiharkan bahawa dia adalah ejen pemaju dan bukannya Aseambankers dan bahawa pemaju sahaja akan bertanggungjawab terhadap tindakan-tindakan, ketinggalan dan kemungkirannya. Dalam sepucuk surat yang ditandatangani oleh perayu bagi pihak pemaju sebagai penerima dan pengurusnya, pemaju melantik responden untuk mengambil alih dan menyiapkan projek tersebut. Responden menyiapkan kerja-kerja dan mendakwa dia tidak dibayar baki sebanyak RM10,251,700.35 untuk kerja yang dilakukan. Angka ini diperoleh daripada ringkasan akaun perayu yang menunjukkan bahawa daripada RM41,408,147.38 yang telah didapati perayu daripada projek tersebut, dia telah mengeluarkan RM31,156,447.03 kepada responden. Responden menyaman perayu di Mahkamah Tinggi untuk mendapatkan semula jumlah baki. Pada perbicaraan, perayu menegaskan bahawa dia tidak bertanggungan secara peribadi untuk menyerahkan jumlah baki kepada responden kerana kontrak responden bukanlah dengannya tetapi dengan pemaju. Dia

menegaskan bahawa dia telah disaman secara salah memandangkan dia pada setiap masa bertindak sebagai ejen pemaju dan pemaju sepatutnya menjadi defendan yang wajar dalam saman tersebut. Perayu juga berhujah bahawa memandangkan akaun muktamad bagi projek tersebut masih belum siap, jumlah baki dipegangnya adalah untuk kepentingan pemiutang bercagar dan tidak bercagar dan dia tidak boleh membuat pembayaran keutamaan kepada responden melangkaui pihak-pihak lain yang mempunyai keutamaan untuk dibayar. Perayu juga berhujah bahawa responden gagal membuktikan dia berhak mendapat jumlah yang dituntut. Rayuan ini dipohon untuk mengetepikan keputusan Mahkamah Tinggi yang membenarkan tuntutan responden.

Diputuskan, membenarkan rayuan dan mengetepikan penghakiman Mahkamah Tinggi:

(1) Perayu tidak bertanggung secara peribadi untuk jumlah yang dituntut oleh responden dan menjadi pihak salah yang disaman berkenaan 'hutang'. Pihak wajar yang sepatutnya disaman ialah pemaju (dalam penerimaan). Kegagalan hakim perbicaraan untuk mempertimbangkan isu ini, walaupun ini adalah satu isu yang perlu ditentukan pada perbicaraan, merupakan satu kesilapan undang-undang yang mengakibatkan salah laksana keadilan mewajarkan campur tangan rayuan. Berdasarkan isu ini sahaja, iaitu sama ada pihak yang sewajarnya telah dijadikan defendan dalam saman tersebut, rayuan seharusnya dibenarkan (lihat perenggan 75 & 78–79).

(2) Perayu pada setiap masa merupakan ejen pemaju. Dalam menjalankan perniagaan syarikat tersebut, dia tidak berurus niaga bagi pihak dirinya sendiri, di mana mengapa transaksi tersebut dilakukan atas nama syarikat. Selain itu, surat perlantikan menyatakan dengan jelas bahawa adalah pemaju yang bertanggungjawab terhadap tindakan-tindakannya. Walaupun s 183(1) Akta Syarikat 1965 ('AS') mengubah kedudukan common law (iaitu penerima tidak menanggung liabiliti untuk kontrak yang dibuat selepas pelantikannya di mana dia dikontrakkan sebagai ejen syarikat atau pemegang debentur) dan menjadikan penerima bertanggungan untuk hutang tertentu yang ditanggungnya semasa penerimaan, bahagian tersebut tidak terpakai dalam kes ini sebagai 'hutang' yang dituntut oleh responden tidak terangkum dalam sub-bahagian 'perkhidmatan yang diberikan', 'barang yang dibeli', atau 'harta yang disewa, dipajak, digunakan atau diduduki'. 'Perkhidmatan yang diberikan' tidak membayangkan seorang penerima dan pengurus mengambil liabiliti untuk kos pembinaan kontraktor berhubung dengan pemulihan projek perumahan. Memandangkan surat award tidak dibuat oleh penerima dalam kapasiti peribadinya, oleh itu hutang tersebut bukanlah 'hutang yang ditanggung olehnya' seperti yang terkandung dalam s 183(1) AS. Hutang tersebut, sebenarnya, hutang yang

ditanggung oleh pemaju kerana perayu telah dilantik pada dasarnya untuk meneruskan perniagaan asal pemaju dalam membina unit-unit dalam projek terbengkalai (lihat perenggan 62–64 & 72–74).

(3) Kontrak, iaitu surat award, adalah antara pemaju (dalam penerimaan) dan responden. Kontrak tersebut perlu ditandatangani oleh penerima kerana dia mempunyai harta yang digadaikan mengikut surat cara pelantikannya. Tetapi itu sendiri tidak boleh menjadikannya secara peribadi bertanggungjawab ke atas hutang yang berpotensi untuk ditanggung berkenaan dengan projek vis a vis responden. Dia melaksanakan surat tersebut dalam kapasitinya sebagai ejen pemaju dan ini terbukti daripada fakta yang dia bertindak pada setiap masa bagi pihak syarikat. Kedudukan umum dalam keadaan sebegitu adalah bahawa prinsipal bertanggungan ke atas tindakan ejennya. Walaupun s 186 Akta Kontrak 1950 menyatakan bahawa ejen dan prinsipal berkemungkinan bertanggungan, keadaan kes ini tidak menjamin pemakaian seksyen tersebut (lihat perenggan 71).

(4) Berdasarkan merit-merit, kesimpulan hakim perbicaraan bahawa jumlah RM10,251,700.35 telah genap masa dan perlu dibayar kepada responden adalah jelas terkhilaf. Responden gagal membuktikan tuntutannya atas imbangan kebarangkalian. Responden tidak mempunyai akaun bebas untuk membuktikan tuntutannya dan bergantung kepada 'pengakuan' oleh penerima dan pengurus dalam ringkasan akaun. Ringkasan adalah satu penyataan mengenai jumlah keseluruhan yang dikumpul oleh perayu, jumlah yang dibayar kepada responden dan baki tertunggak. Tidak terbukti bahawa keseluruhan baki dalam akaun penerima perlu dibayar kepada responden. Seperti yang dinyatakan oleh perayu, wang yang dipegang dalam akaunnya adalah untuk kepentingan pemiutang bercagar dan tidak bercagar (lihat perenggan 80–82 & 84–86).]

Notes

For cases on receiver's personal liability, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 890–894.

Cases referred to

Abdul Samad bin Haji Alias (as receiver and manager of Rajiv Enterprises Sdn Bhd) v Government of Malaysia & Ors [1993] MLJU 333, HC (distd)

Associated Newspapers Ltd v Grinston [1949] 66 WN (NSW) 211 (folld)

Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal [1992] 2 MLJ 734, SC (refd)

Gaskell v Gosling [1896] 1 QB 669, CA (refd)

Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd (1970) 92 WN (NSW) 199 (refd)

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In

liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd) A
Tan Ah Tek (t/a Plumbcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd [1992] 1 MLJ 553, HC (refd)

Legislation referred to

Companies Act 1965 ss 183, 183(1), 191, 292, 292(3), (5) B
Contracts Act 1950 s 186

Appeal from: Summons No 22NCVC-212–02 of 2013 (High Court, Kuala Lumpur)

C

Bala Pillai (Apparao Apana with him) (Bala Pillai & Co) for the appellant.
Surjan Singh Sidhu (Karminder Kaur with him) (Zainudin Wan Nadzim Chua & Mazlinda) for the respondent.

Nallini Pathmanathan JCA: D

INTRODUCTION

[1] This was an action brought by the respondent, Syarikat Perumahan Negara Bhd, as a third party contractor, against the appellant, one Abu Bakar Rajudin, a receiver and manager appointed pursuant to a debenture, over the assets of a company known as Syarikat Usahasama Kam-Ldah Sdn Bhd. E

[2] The respondent claimed a sum of RM10,251,700.35 from the receiver and manager personally. The said sum was stated to be the balance sum due and owing to it in respect of construction work carried out for the developer company. The appellant opposed the claim on the grounds that he was not liable for this sum in his personal capacity. F

G

[3] The appellant further contended that the final accounts setting out the precise sum due and owing to the respondent, had not been established by the respondent. As a consequence, he was unable to surrender the amount claimed by the respondent. In any event, the monies remaining in his possession as a receiver and manager of Syarikat Usahasama Kam-Ldah belonged to both secured and unsecured creditors, and accordingly could not simply be made over to the respondent. H

[4] The primary issue that fell for consideration in this appeal was whether the proper party to be sued in the court below as defendant was: I

(a) the receiver and manager in his personal capacity; or

(b) the company (in receivership).

[5] Although this issue was raised in the court below as one of the agreed issues to be tried, the learned trial judge made no mention of, nor determined this issue.

[6] On the merits, the issue that fell for consideration was whether the respondent had proven its claim.

[7] On 4 November 2015, we heard the appeal and allowed it. We append below the grounds for our decision.

[8] The respondent was the plaintiff in the court below while the appellant was the defendant. The parties will be referred to as they were in the High Court in the rest of the judgment.

MATERIAL FACTS

[9] Syarikat Usahasama Kam-Ldah Sdn Bhd was the developer of a project known as Taman Mutiara, Kampung Sungai Bedaun, Wilayah Persekutuan Labuan ('the project').

[10] For the purposes of the project, Syarikat Usahasama Kam-Ldah Sdn Bhd ('the developer') took a syndicated bridging loan from Aseambankers Malaysia Bhd ('Aseambankers'). As security for the loan, the developer executed a debenture with Aseambankers. However, the developer ran into financial difficulties, defaulting on the repayment of the loan. As a consequence, the project was abandoned.

[11] Danaharta Nasional Bhd ('Danaharta') subsequently took control of the project. At the request of Danaharta, the plaintiff was invited to rehabilitate the project. At a meeting in or around 1 August 2002, Danaharta advised that one of the ways of resuscitating the abandoned project was for Danaharta to appoint a receiver and manager. This proposal was supported by the plaintiff. Danaharta however went on to advise that as the revised project was envisaged to 'see a negative return', the costs of appointing a receiver and manager should be borne by the plaintiff. As such, Danaharta maintained that prior to any appointment being made, a letter of indemnity was required from the plaintiff. The plaintiff was agreeable to the provision of such a letter. Danaharta then advised that it would instruct Aseambankers, as its agent, to effect the appointment of the receiver and manager, upon receipt of the indemnity or undertaking from the plaintiff.

[12] The board of directors of the plaintiff met and resolved to issue the requisite letter of undertaking. Vide letter dated 21 October 2002, the plaintiff duly issued the letter of indemnity to Aseambankers in its capacity as agent.

The plaintiff undertook to pay or reimburse the agent bank, Aseambankers, for expenses incurred by the receiver and manager, as well as his remuneration, with a cap of RM255,000 for a period of one year. It further agreed to indemnify the agent bank against all actions proceedings claims and demands, which the receiver and manager may incur, provided that he exercised his powers in a proper manner and without any wilful default.

[13] On 25 October 2002, vide a letter from Aseambankers to the defendant, the latter was duly appointed the receiver and manager of the project. The appointment of the defendant was formalised by a deed of appointment dated 1 November 2002, which declared expressly that the receiver and manager '... shall be the agent of the company and not of Aseambankers and the company alone shall be wholly responsible for the acts, omissions and defaults of the receiver and manager'.

[14] Given that the defendant had been appointed with the express consent of the plaintiff, and that the plaintiff had even undertaken to bear all costs and expenses in relation to such appointment, the plaintiff knew, or ought to have known, of these terms.

[15] Vide a letter of award dated 16 December 2002 *the company (receiver and manager appointed), ie Syarikat Usahasama Kam-Ldah Sdn Bhd (receiver and manager appointed)*, appointed the plaintiff as the 'turnkey contractor' for the project. More specifically, this letter of award addressed to the plaintiff, reads as follows in its salient parts:

> Cadangan Pemulihan Projek Perumahan Kos Redah dan Kos Sederhana Rendah Di Taman Mutiara, Sungai Bedaun Wilayah Persekutuan Labuan — Letter of Award
>
> *We* are pleased to inform that you are hereby appointed as the Turnkey Contractor for the above project subject to the following terms and conditions.
>
> 1. Scope of works
>
> ...
>
> 2. Contract Sum
>
> The provisional Contract Sum shall be RM63million. Any escalations are to be discussed with an agreed *by us*.
>
> 3. Contract Period
>
> ...
>
> 4 ...
>
> 5 ...
>
> 6 ...
>
> ...

A We undertake to pay all your claims towards completion of the project from the balance proceeds available with the end-financiers in the manner agreed by both parties.

9. The Defect Liability Period (DLP) shall be 12 months from the issuance of Certificate of Practical completion (CPC)

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10. You will be informed when the Contract Document is ready for signature. Until such time as a formal contract document is prepared and executed, this duly signed letter of award shall constitute a binding contract between you and us.

11 ...

C Yours faithfully,

For Syarikat Usahasama Kam-Ldah Sdn Bhd.

(Receiver and Manager Appointed)

Abu Bakar Rajudin

D (The Receiver and Manager)

(Emphasis added.)

[16] This letter of award, although issued subsequent to the appointment of E the receiver and manager, was issued on the letterhead of the developer company (receiver and manager appointed).

[17] As is apparent from the last paragraph above, the defendant signed the letter of award on behalf of the developer-company (receiver and manager F appointed).

[18] On 15 October 2004, Aseambankers wrote to the defendant with the consent of the plaintiff to extend his tenure as receiver and manager for another two years up to 31 October 2005.

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[19] On 15 February 2007, Aseambankers extended the tenure of the defendant as receiver and manager at the specific request of the plaintiff. The appointment was extended from October 2005 until 31 December 2007 or H until expiry of the defects liability period for the project, whichever is the later. Once again the plaintiff undertook to pay the receiver's fees, subject to his exercising his powers properly. The extension was accepted by the defendant.

[20] On 16 February 2007, Prokhas Sdn Bhd ('Prokhas') assumed the role of I manager and agent from Aseambankers. As such all powers, rights and obligations of the manager and agent under the syndicated bridging loan facility, ie the role of Aseambankers, as well as the related security documents were assumed by Prokhas.

[21] Pursuant to the letter of award, the plaintiff completed the construction of 2,000 units of houses for the project in four phases. The defendant, in his capacity as receiver and manager, collected the sum of RM41,408,147.38 from the project and released RM31,156,447.03 to the plaintiff.

[22] The plaintiff sought full payment for the work done, claiming a balance sum of RM10,251,700.35. A letter of demand dated 3 October 2009 was issued to the defendant. The defendant did not pay the balance sum to the plaintiff.

[23] The plaintiff then brought this action against the defendant in his personal capacity, for payment of the sum of RM10,251,700.35 stated to be owing to it under 'progress billing' with interest and costs.

[24] The defendant maintained that he was not liable in his personal capacity to pay the plaintiff because the contract or the letter of award was between the plaintiff and the developer company. Apart from this, the defendant maintained, inter alia, that he had no knowledge of, nor had been privy to any 'progress billing'. The defendant also maintained that final accounts had not been completed and accordingly, he held the balance monies generally for secured and unsecured creditors.

[25] In the High Court, the plaintiff produced four witnesses and the defendant produced one witness. The plaintiff relied, inter alia, on a summary of accounts issued by the defendant where the said balance sum of RM10,251,700.35 appeared to be due and owing to it. However, the plaintiff was unable to produce any of its own accounts or primary documents to establish its entitlement to the balance sum. In other words, there were no documents produced which independently established the breakdown and entitlement to the sum claimed by the plaintiff.

[26] The defendant, while admitting that the summary of accounts showed the sum of RM10m odd was owed to the plaintiff in the course of cross-examination, went on however to maintain that the plaintiff's claim was baseless. In the course of re-examination he said however, that the balance in his bank account was '41 take away 30' meaning approximately RM11m. He stated that this sum belonged to secured and unsecured creditors.

[27] In relation to the issue of capacity, the defendant maintained that his appointment was not in his personal capacity but as receiver and manager of the company. It was put to him that the letter of award of 16 December 2002 was between himself and the plaintiff, but the defendant denied this. He

maintained the duty or responsibility to pay the plaintiff lay with whosoever had appointed the plaintiff, namely Aseambankers (and subsequently Prokhas).

[28] Evidence was adduced in relation to the attempts at settlement between the parties. There was a series of negotiations between the parties' solicitors, whereby the defendant's solicitors offered to resolve the matter amicably by payment of a sum of RM8.5m odd. The offer was however, rejected by the plaintiff.

[29] After a full trial, the High Court allowed the plaintiff's claim against the defendant with interest at 5%pa from the date of decision until full payment with costs of RM30,000. The defendant was dissatisfied with the decision and appealed to the Court of Appeal.

[30] The matter first came before a different panel of the Court of Appeal on 18 November 2014. The issue of whether the commencement of the suit against the receiver and manager in his personal capacity was proper was raised by that panel. In the High Court suit, the defendant was cited as 'Abu Bakar Rajudin (daripada Abu Bakar Rajudin & Co yang bertindak sebagai penerima dan pengurus bagi Syarikat Usahasama Kam-Ldah Sdn Bhd)'.

[31] The plaintiff then filed a motion to amend the High Court pleadings so that the intitulement read vis a vis the defendant 'Abu Bakar sebagai penerima dan pengurus bagi Syarikat Usahasama Kam-Ldah Sdn Bhd'). The motion was allowed by the Court of Appeal on 17 March 2015.

THE APPEAL

[32] Notwithstanding the amendment to the intitulement of the statement of claim, we were of the view that the issue of whether the proper party to the action had been named as defendant, still remained to be determined. This was because the defendant maintained that it was the developer company (in receivership) that should have been sued and not the defendant as appeared in the intitulement, as the substantive evidence at trial disclosed that he was still being sued in his personal capacity.

[33] As such the primary issue that arose was whether the action should have been brought against the receiver and manager in his personal capacity or against the company (in receivership).

THE PARTIES' SUBMISSIONS

The defendant's (appellant's) submissions

[34] Before us, learned counsel for the defendant contended that the learned trial judge had erred in law in failing to consider the capacity in which the defendant was sued, notwithstanding that the defendant had raised this issue. (As stated earlier, it was one of the issues to be tried.)

[35] The defendant further submitted that the plaintiff ought not to have 'named' the receiver and manager 'in his personal capacity', as that made him personally liable for the claim of RM10 over million claimed by the plaintiff. Instead, the defendant maintained that the rightful party to be sued was the developer company which was in receivership.

[36] Learned counsel for the defendant then proceeded to set out the full chronology of events relating to this action. We have set out the material facts above. In respect of the letter of award of 16 December 2002, it was submitted that the receiver and manager, ie the defendant, sent this letter in his capacity as agent of Syarikat Usahasama Kam-Ldah Sdn Bhd. Accordingly, the defendant maintains that he is not personally liable for the monies claimed by the plaintiff. It was the developer that was liable because the defendant was at all times the agent of that company. The prima facie cause of action, it was contended, was wrongly commenced against the receiver and manager in his personal capacity.

[37] The defendant then explained that this issue of capacity was highlighted at the first hearing of the appeal when the plaintiff was asked whether the commencement of the suit is proper and whether the receiver and manager can be sued in his personal capacity. At the plaintiff's request, an adjournment was then granted for the plaintiff to make the necessary amendments.

[38] The plaintiff filed an application, which was heard on 17 March 2015, to amend the pleadings, seeking to alter the intitulement relating to the defendant to 'Abu Bakar Rajudin (as receiver and manager of Syarikat Usahasama Kam-Ldah Sdn Bhd)' from 'Abu Bakar Rajudin (daripada Abu Bakar Rajudin & Co yang bertindak sebagai penerima dan pengurus bagi Syarikat Usahasama Kam-Ldah Sdn Bhd)'.

[39] Learned counsel for the defendant submitted that he opposed the amendment on the grounds that it made no material change, in that the receiver remained personally liable for the monies claimed. However, the amendment was allowed, and it was held that the issue of capacity could be ventilated at the appeal proper.

[40] Learned counsel for the defendant then went on to cite a series of cases in support of his submission on the issue of capacity, including *Gaskell v Gosling* [1896] 1 QB 669 (CA), *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, SC and *Tan Ah Tek (t/a Plumbcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd* [1992] 1 MLJ 553.

[41] On the merits, it was submitted on behalf of the defendant that the letter of award was not properly admitted in evidence. The learned trial judge had in fact admitted it as evidence and marked it as P10.

[42] It was further submitted that as there was no turnkey contract executed there was no contract between the parties.

[43] It was further contended that the plaintiff had failed to adduce any evidence to establish that a debt of RM10,251,700.35 was due to the plaintiff. The plaintiff had in fact relied on a summary of accounts produced by the defendant.

[44] It was further pointed out that there was no evidence adduced by the plaintiff to establish that there was progress billing. In other words, there was no evidence adduced by the plaintiff to show that they had progress billed or paid out monies to complete the project.

[45] Numerous other contentions in relation to the admitting of evidence by the trial court and the failure of the plaintiff to establish the computation or basis for its claim were put forward.

The plaintiff's (respondent's) submissions

[46] In relation to the issue of capacity, the plaintiff maintained that the learned trial judge did not err in law because the defendant had expressly admitted in his defence that he was appointed the receiver and manager of the developer company. This fact was also established by the defendant's own submissions.

[47] The plaintiff went on to say that counsel for the defendant was wrong in maintaining that the defendant had been sued in his personal capacity because he was sued as 'the receiver and manager' of Syarikat Usahasama Kam-Ldah Sdn Bhd. Moreover, he had signed the letter of award. Although the letter of award was on the letterhead of the developer company, it was maintained that his appointment was not that of an agent.

[48] Again it was reiterated that the defendant is not sued in his personal capacity but in his officially appointed capacity as the receiver and manager of the developer company. To this end, he cited several cases from *Mallal's Digest* where the intitulement sets out the name of the receiver and manager followed by the words as receiver and manager of the company in receivership. These cases included *Abdul Samad bin Haji Alias (as receiver and manager of Rajiv Enterprises Sdn Bhd) v Government of Malaysia & Ors* [1993] MLJU 333 and others.

[49] Learned counsel for the plaintiff then went on to distinguish all the cases cited by the defendant including the case of *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734 (SC). Primarily it was contended that in these cases, the receiver and manager had been appointed after entry into the contracts by the principal.

[50] As for *Kimlin*, it was submitted that this case was intituled as such because the receiver and manager was appointed and subsequently a liquidator, hence the receiver and manager's agency stood terminated upon winding up and the appointment of a liquidator.

[51] Section 183 of the Companies Act 1965 was also cited as the basis for the culpability or personal liability of the defendant as receiver and manager.

[52] In essence, the plaintiff's stance was that the receiver and manager was personally liable for the repayment of the sum of RM10,251,700.35 as the contract was entered into by the defendant and as it was concluded after his appointment.

[53] On the merits, it was submitted on behalf of the plaintiff that there was a concluded contract between the plaintiff and the defendant as sufficient terms were set out in the letter of award. The fact that there was no subsequent turnkey contract did not preclude the coming into effect of a contract. Moreover, there had been performance under the letter of award resulting in the completion of the project.

[54] On the merits, learned counsel for the plaintiff explained why the letter of award should be marked as an exhibit, stating, inter alia, that the defendant himself, as maker, had testified and as such the document was correctly admitted in evidence by the learned judge.

[55] As for the submission by the defendant that no turnkey contract had been executed, case-law was cited in support of the proposition that a contract had come into existence by virtue of the terms and conditions of the letter of award as well as performance of the contract.

[56] In response to the contention that the plaintiff had failed to prove its case, reliance was placed on the admissions by the defendant as to the quantum remaining in the receiver's account as sufficiently establishing the debt claimed by it.

THE DECISION OF THE COURT OF APPEAL

[57] With respect to the primary issue of law, namely whether the defendant is personally responsible for the sum claimed by the plaintiff, we concluded, as stated at the outset, that the defendant is not personally so liable.

[58] The reason for our conclusion stems from a consideration of the law on this subject.

[59] With respect to the private appointment of the defendant, the appointment is based upon the triggering of a default clause in the primary lending agreement. In the instant case, the developer company had long defaulted in its repayments and the lender, ie Aseambankers, was therefore entitled to exercise its rights under the debenture. However, the effect on the developer company itself is that it remains intact as a separate legal entity. This was explained in the case of *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* (1970) 92 WN (NSW) 199 at p 209 by Street J, as follows:

> Receivership and management may well dominate exclusively a company's affairs in its dealings and relations with the outside world. But it does not permeate the company's internal domestic structure. That structure continues to exist notwithstanding that the directors no longer have authority to exercise their ordinary business-management functions.

[60] Such an appointment of a receiver and manager only allows control over those assets over which the lender has security. This will therefore depend on the extent of the security. It is therefore possible that there is remaining capacity for the directors to take certain management functions. In any event, the directors still have to comply with their duties under the Companies Act 1965. In short, the company continues in existence as a separate and distinct entity from the receiver and manager who has control over the assets for the purposes of the receivership.

[61] The position of the receiver and manager is either the agent of the debenture holder or the company depending on the terms of the agreement. A privately appointed receiver however, is usually an agent of the company. In a book entitled *Company Receivers and Administrators* (2nd Ed, 2000) by J O'Donovan, at para [8.20] the author explains the position thus:

> Privately appointed receivers and managers are usually expressed to be agents of the company. The receiver's agency has been described as 'special' and 'limited' and logically untidy'. By the same token in *O' Callaghan v Custom Credit Corporation Ltd Anderson J* stated that the receiver's agency is real and supported by valuable consideration.

[62] The receiver and manager will therefore at common law not be personally liable in respect of the debts properly incurred in the course of the receivership. Therefore, the original common law position is that a receiver does not incur liability for contracts entered into after his appointment where he contracts as an agent of either the company or the debenture holder.

[63] In the instant case the receiver was at all times an agent of the developer company. In this context, the general position is that the principal is responsible under the contract. (See *Corporate Receivership — The Law and Practice in Malaysia and Singapore* by Saheran Suhendran bin Abdullah, Lim Tian Huat and Edwin Chew (1997), published by Butterworths Asia, at p 282.)

[64] However, the common law position has been overridden or modified by statute in Malaysia (and in other jurisdictions). Section 183(1) of the Companies Act 1965 makes a receiver personally liable for certain debts, which he incurs in the course of the receivership. Section 183 provides as follows:

> Any receiver or other authorised person entering into possession of any assets of a company for the purpose of enforcing any charge shall, notwithstanding any agreement to the contrary but without prejudice to his rights against the company or any other person, *be liable for debts incurred by him* in the course of the receivership or possession, for services rendered, goods purchased or property hired, leased, used or occupied. (Emphasis added.)

[65] There is usually a right of indemnity from the assets of the company and there may also be an agreement with the appointor, ie the debenture-holder. However, where a receiver carries on the business of the company, the receiver and manager is not thereby transacting on his or her own behalf. The transaction is done in the name of the company.

[66] As stated in *Kerr & Hunter on Receivers and Administrators* by Muir Hunter, 18th Ed published by Sweet & Maxwell (2005) at para 20–67:

> *The receiver as a party to litigation*. In litigation concerning the company, the receiver is not normally a necessary or proper party. As the agent of the company, his acts or inactions are acts or inactions of the company, and he bears no personal responsibility to any party who may be injured as a result. Thus if the result of his actions or inaction is simply that the company does not perform a contract with a

A third party, that party's right of action is simply against the company. (Emphasis added.)

B **[67]** What then is the effect of s 183(1) of the Companies Act 1965? As explained in *Corporate Receivership — The Law and Practice in Malaysia and Singapore* at pp 282 and 283, the authors point out that receivers are liable in the course of the receivership in respect of:

C (a) services rendered;

(b) goods purchased; or

(c) property hired, leased, used or occupied.

D **[68]** While these statutory provisions may well appear to be wide, the construction accorded to these sub-categories was construed narrowly in the Australian case of *Associated Newspapers Ltd v Grinston* [1949] 66 WN (NSW) 211. The Australian companies' legislation which contains an equivalent provision was considered in that case. It was held that none of these sub-categories or classes of debts could be taken to include a receiver's liability E to a third party under contracts for the printing of magazines. In short, the receiver could not be held personally liable for such printing costs by a third party. The court then suggested certain limits on the extent of the debts covered in these subsections:

F The point arises as to whether this transaction is covered by the provision of s 337(3) of the Companies Act 1936.

...

The material portions of it read as follows: 'Any receiver ... entering into possession ... for the purpose of enforcing any charge ... shall, notwithstanding any agreement G to the contrary ... be liable for debts incurred by him in the course of the receivership . for services rendered, goods purchased or property hired, leased, used or occupied.'

...

H ...

The question is whether sub-s (3) has introduced a new principle into the law relating to receivers and managers in possession. The subsection is curiously phrased and appears to be given a limited operation, because the debts for which the receiver incurs personal liability are those which he has incurred in the course of the I receivership for services rendered, goods purchased, or property hired, leased, used or occupied. None of those words are very apt in the circumstances of the present case. 'Services rendered' rather suggests the ordinary master and servant account for work done where a claim is made by the servant. One construction of the section might limit those words to the obligation to pay something in the nature of wages and salary to a staff employed by the receiver after his appointment and in the course

> of his receivership. In the same way it seems to me that the words 'goods purchased' are not very applicable to the claim of the present company. The plaintiff's claim is not for goods sold, it is for work done.
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> If the receivers had undertaken by an independent contract to assume a personal liability, then they would be personally liable, but in either of those cases the liability would not rest on the terms of s 337; it would rest on the terms of the agreement which had been made, and s 337 does not aid or impede such a transaction.

[69] Therefore 'services rendered' suggests an ordinary employer/employee relationship where a claim is made by an employee. It was construed as the obligation of the receiver to pay salaries to staff employed in the course of the receivership. It was not construed to extend to liability to third parties for work done. The limitation construed in respect of 'services rendered' is most pertinent to the instant case.

> 'goods purchased' would not include an obligation to pay a third party for any work done either; and
>
> 'property hired, leased, used or occupied' was said to be related to the hire, leasing, or occupation of real or personal property.

[70] Ultimately the question of whether a particular debt incurred in the course of the receivership falls within any of the subsections, thereby making the receiver and manager appointed personally liable, is dependent upon the facts of the case. But clearly the statute cannot be construed so as to render every post-appointment debt incurred in the course of the receivership, the responsibility of the receiver and manager.

[71] Turning to the instant case, as we have stated earlier in the salient facts, the contract, ie the letter of award, was between Syarikat Usahasama Kam-Ldah (receiver and manager appointed) and the plaintiff. Therefore it is clear that the letter of award was between the company (in receivership) and the plaintiff. It had to be signed by the receiver as he was possessed of the charged property in accordance with his instrument of appointment. But that in itself could not make him personally liable for the potential debts to be incurred in respect of the Taman Mutiara housing project vis a vis the plaintiff. He executed the letter in his capacity as an agent of the developer company and this is evident from the fact that he acted at all times on behalf of the company. He in fact undertook the responsibility to supervise or facilitate the rehabilitation of the project for the developer company. In such capacity, namely as agent of

the developer company he would not, and did not incur any personal liability. The general position in such a situation is that the principal is liable for the acts of his agent. Although s 186 of the Contracts Act 1950 envisages that both an agent and the principal may be liable, the circumstances of this case do not warrant the application of the section.

[72] The letter of award was not made by the receiver in his personal capacity. It is not therefore a 'debt incurred by him' as envisaged in s 183(1) of the Companies Act 1965 notwithstanding that the contract was made post-appointment. It is in fact a debt incurred by the developer company after the appointment of a receiver and manager. This is because it is apparent from the contents of the letter of award that the receiver and manager was appointed to essentially continue with the original business of the developer company in constructing units in relation to the abandoned project known as Taman Mutiara.

[73] As stated above, when a receiver and manager carries on the business of the company, the receiver and manager is not transacting on his own behalf, which is why the transaction is done in the name of the company. Additionally, the deed of appointment made it expressly clear that it was the developer company that was responsible for the acts of the receiver and manager. Finally, s 183(1) has three subsections that specify the class of debt in respect of which the receiver may be personally liable for contracts entered into after his appointment.

[74] From the construction adopted in *Associated Newspapers v Grinston* in respect of Australian legislation which is similar to our provision on this issue, it is evident that the 'debt' claimed by the plaintiff does not fall within the subsections of 'services rendered', 'goods purchased' or 'property hired, leased, used or occupied'. Services rendered does not envisage a receiver and manager taking on liability for the costs of construction of a contractor in respect of a rehabilitation project involving some 2,000 units of housing and shoplots. We are in agreement with the suggestions made in *Associated Newspapers v Grinston* in construing s 183(1) of the Companies Act 1965.

[75] For these reasons, we were of the view that the receiver is not personally liable for the sum of RM10,251,700.35 claimed by the plaintiff against the receiver and manager. It is the company in receivership that is liable for the said debt. It therefore follows that the incorrect party was sued in respect of the debt. The correct party ought to have been Syarikat Usahasama Kam-Ldah Sdn Bhd (in receivership).

[76] With respect to the cases cited by learned counsel for the plaintiff from *Mallal's Digest*, it is apparent upon a perusal of the same that they are all cases

where the receiver or receiver and manager has sought directions from the court in relation to the priority of debts, for example the priority to be accorded to debts under the employees provident fund and sales tax. That is entirely distinguishable from a case seeking to make a receiver and manager liable for the debt incurred by the company, notwithstanding that the contract was executed post-appointment. The point is that the contract was between the company in receivership and the plaintiff, and not the receiver and manager personally and the plaintiff. As stated above, this is apparent from a perusal of the letter of award.

[77] Learned counsel for the plaintiff maintained in his submissions that the action was against the receiver and manager in his official capacity. However the effect of the plaintiff's intitulement in the writ as amended still seeks the 'debt' to be repaid by the receiver and manager in his personal capacity. It is not therefore simply a question of intitulement. The issue goes further as the consequence of the pleadings as a whole make the receiver and manager, rather than the company in receivership, liable for the 'debt'.

[78] It is apparent from a reading of the judgment that the learned trial judge failed to consider this issue. There is no mention of this issue despite it being an issue to be determined at trial. In failing to consider this issue, the learned judge has committed an error of law, which warrants intervention by the Court of Appeal. Such failure has resulted in a miscarriage of justice whereby the defendant in his capacity as a receiver and manager has been made personally liable for carrying on the original business of the developer company in the sum of not less than RM10,251,700.35.

[79] On this issue alone, namely whether the proper party had been made defendant in the suit, we were of the considered view that the appeal should be allowed. As such the merits of the claim was very much a secondary issue.

THE MERITS OF THE CASE

[80] We were not convinced that the sum of RM10,251,700.35 was actually due and payable immediately to the plaintiff from the balance sum in the receiver's account. A perusal of the plaintiff's witnesses' evidence discloses that they were unable to ascertain independently the quantum stated to be owed to the plaintiff. In short, they had no independent accounts to establish their claim.

[81] They relied on an 'admission' by the receiver and manager in his summary of accounts, marked as P10. This summary of accounts is stated to be the 'total billing' and 'outstanding' as at 13 February 2013 in respect of Taman Mutiara Labuan. More specifically, in relation to the plaintiff, it is stated that a

sum of RM31,156,447.03 has been paid out to it. The summary then states that there is an outstanding balance of RM10,251,700.35. From this summary, the plaintiff maintains that the said sum is therefore due and owing to the plaintiff as of 13 February 2013.

[82] However, this summary is a statement of the total quantum collected by the receiver and manager as well as the amount paid to the plaintiff and the outstanding balance. The quantum stated to be 'outstanding' does not necessarily translate to the said sum of RM10,251,700.35 being immediately due and payable to the plaintiff. As stated by the receiver and manager, the monies held in his account were for the benefit of secured and unsecured creditors.

[83] In so far as the unsecured debts are concerned, s 191 of the Companies Act 1965 requires that the receiver make payments out of the balance sum available for preferential debts which are due as per s 292 as well as sub-ss 292(3) and (5), in priority to even the debenture holder.

[84] As for secured creditors, they take priority over the unsecured debt of the plaintiff. In these circumstances, the amount claimed by the plaintiff cannot be paid out to it without these claims being deducted. Therefore it has not been established that the sum remaining in the receiver's account in its entirety is payable to the plaintiff. To this end, as stated earlier, the plaintiff has failed to provide any statement of final accounts, which it is expected to do, given that the burden lies on the plaintiff to establish its claim. Neither were any questions posed to the receiver and manager with a view to establishing the quantum, if any, available after payment of the preferential debts and the sum due to secured creditors.

[85] As these issues remained at large, we were not convinced that the plaintiff had established, on a balance of probabilities, that the said sum was a debt due and payable to it, warranting the grant of judgment. To our minds, the plaintiff had not proven its claim. In any event, any such claim should, in view of our conclusion that it is the developer-company's debt, be treated as an unsecured debt of the company in receivership. Any payment out of this sum directly to the plaintiff would amount to a preference.

[86] The learned trial judge failed to consider these issues in relation to the merits of the case. As such her conclusion that the sum of RM10,251,700.35 is due and payable to the plaintiff is plainly wrong and warrants appellate interference. However, it is her primary finding, that it is the receiver and manager himself rather than the company in receivership that is liable for the debt stated to be due to the plaintiff, which is the primary error that warrants the setting aside of the judgment.

CONCLUSION

[87] We therefore allowed the appeal and set aside the judgment of the learned judge. We awarded a sum of RM20,000 to the appellant in respect of costs incurred both here and in the court below. The deposit was refunded to the appellant.

Appeal allowed and judgment of the High Court set aside.

Reported by Ashok Kumar